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BOOK REVIEWS.

HARRY ROTKOWITZ, *Editor-in-Charge.*

A HISTORY OF CONTINENTAL CRIMINAL LAW. By CARL LUDWIG VON BAR. Translated by Thomas S. Bell. Boston: LITTLE, BROWN & Co. 1916. pp. lvi, 561.

This book is one of the Continental Legal History Series published under the auspices of the Association of American Law Schools. The work is in the main a translation from the German of Von Bar's "*Geschichte des Deutschen Strafrechts und der Strafrechtstheorien*" which was published in Berlin in 1882. There are also additional chapters concerning the development of the criminal law in Scandinavia, Austria, Switzerland and France, which have been taken from the writings of six other authors, so that to this extent the history, as it appears in translation, is the composite result of the work of several hands.

The work of Von Bar, which composes the basis of the translated volume, was recognized on its publication in Germany as a leading work of its kind. The author who had served on the Appellate Court at Göttingen and subsequently held professorial chairs at Rostock, Breslau and Göttingen, was unusually well qualified for his task. Von Bar said that no history of criminal law of real value could be written except by one who had a first-hand knowledge of the individual details of his subject, and who did more than merely recast the work of others. Accordingly, we find that his statements are generally supported by references to original authorities, and that where the matter that he deals with is ancient, he sets out the original Latin or other foreign text on which he relies. Professor R. Loening, in the "*Zeitschrift für die gesammte Staatsrechtswissenschaft*," Vol. 3, p. 473, says of Von Bar: "He is abundantly acquainted with the sources of his subject from his own inspection, and he is therefore qualified above everything else, to go to work in a critical manner, a thing which one so rarely finds among other writers on the history of criminal law." Every page of the work shows that this praise is well deserved.

Since the Roman Law so largely affected the Germanic criminal law, it is only natural that the author begins his work with an account of the Roman criminal law. He finds the origin of this, as of all other systems of criminal law, to have come from two sources. "One of these sources is the principle of *vengeance* as a retaliation for a wrong. The other source lies in the *subordination of the individual to some higher authority*; this authority, whether it be the family, the clan, the community, or even the state, is one which strives to maintain a certain degree of order for purposes more or less clearly defined." (p. 5) In the history of the Roman law, the author states that "private vengeance was suppressed at a very early period." This was first noticeable in crimes of violence, and in the early days, it seems that murder might be punished by the state with the penalty of death. (p. 12) In the statutes of the later Roman Republic, however, the death penalty was never mentioned, Cicero stating that the very thought of punishment by an executioner was unworthy of a Roman citizen and a freeman. (p. 29) As a matter of fact, the death penalty was tolerated at this period, but only as a kind of extra-legal necessity. (*Ibid.*) Under the Roman Empire, however, death became a frequent penalty, owing to the arbitrary and capricious power of the emperors. In many cases,

the punishment bore no proportion to the magnitude of the offense, as where under the Emperor Constantine, it was provided that any nurse or governess who aided in an abduction should have molten lead poured into her mouth. (p. 56.) The author concludes that "the principles of the Roman criminal law, excellent in many respects, had only an uncertain and precarious application. They were known to the jurists, but were never the absolute property of the people. . . . The genius of the Germanic peoples was able to reject the irrational elements and at the same time to make the fundamental principles the permanent property of the entire civilized world." (Ibid.)

The subsequent chapters of Von Bar's work deal with the development of primitive Germanic criminal law, and follow its history through the Middle Ages to modern times. It is interesting to note that neither in the Roman law nor in the early Germanic law was attempt punished as a separate offense, it being punished, if at all, under the head of the crime attempted rather than under any rational principle. (See pp. 41, 103, 130, 157.)

One of the most interesting and instructive chapters in the book is the one dealing with the Christian Church Law. (p. 79.) The Church, being interested in the moral welfare of its members, and having spiritual jurisdiction over sins, and imposing penalties for their commission, not unnaturally had a tendency to punish moral guilt which had led to no external result that was injurious to the state. The punishments imposed upon heresy are an example of this tendency. The author brings out with great force the truth that it is only by punishing acts and not mere thoughts that we can have a sound system of criminal law. "The history of the criminal law of the Church offers an illustration of the truth that only by adherence to an objective or outward standard can steady development of the criminal law be obtained. By taking the external standard, it is possible to reach gradually a juster valuation of inward or personal guilt. If we are to hope to detect inward guilt by human agencies we must resort exclusively to external manifestations. . . . Exclusive regard for the moral element leads endlessly nowhere." (p. 92.) Nevertheless, the author gives the Church credit for calling attention to the importance of the subjective element in guilt and of contributing to penology "the idea of reformation implying that punishment should benefit the offender".

The succeeding chapters of Von Bar's work deal with the Renaissance, the Reformation and the reception by Germany of the Roman Law in the eighteenth century; a subsequent title follows on the French Revolutionary Period, and this is followed by a title dealing with the modern law. The second part of the book deals with the history of the theories of the criminal law from ancient to modern times. An appendix contains Von Bar's critique of the theory of criminal law, which is placed at the end of the book because the editors deemed it critical rather than historical in its treatment.

In regard to the chapters contributed by the other authors, it need only be said that they appear to be worthy to be placed in the company of such a distinguished writer as Von Bar. The editorial preface by Professor Wigmore is also a valuable contribution to the work. The translators have performed their work well, and have produced a book whose English is flowing and unstilted, a not too easy task in translating from the German. It may be said with confidence that the translated work is one of great and permanent value to the student of the history of the criminal law.

Ralph W. Gifford.